MEGA SAKTI SDN BHD

v.

WONG WAI HOI & ORS & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ZULKEFLI MAKINUDIN JCA
SURIYADI HALIM OMAR JCA
[CIVIL APPEAL NOS: W-02-762-2005 & W-02-1257-2005]
31 JULY 2007

CIVIL PROCEDURE: *Affidavits - Authority to affirm - Whether deponent of affidavit had authority to affirm affidavit on behalf of appellants - Deponent not an appellant - Purported letter of authorization from appellants exhibited in deponent's affidavit - Whether sufficient - Whether any secondary authentication of deponent's authority required - No affidavits filed by appellants to confirm deponent's authority - Whether flaw in affidavit goes to heart of matter or merely an irregularity*

CIVIL PROCEDURE: *Affidavits - Admissibility - Striking out of scandalous, irrelevant or otherwise oppressive affidavits - Deponent not having personal knowledge of facts - Blanket statement by deponent that facts were obtained from records which he had access to without specific details of records given - Courts to demand stricter adherence to rules of evidence where credibility of affidavit is under scrutiny - Whether flaw in affidavit goes to heart of matter or merely an irregularity*

CIVIL PROCEDURE: *Appeal - Evidence, evaluation of - No admissible evidence on record - Affidavit in support of original application declared defective and inadmissible - Whether appellate court precluded from going into merit of appeal*

The respondent had been ordered to be wound up by the High Court. The appellants were the purchasers of the housing project known as the Desarina Condominium to be built by the respondent. The respondent had failed to complete and deliver vacant possession of the apartments/condominium to the appellant within the stipulated time frame. The appellants, premised on the ground of them being purchasers of the Desarina Condominium, had filed a summons-in-chambers requesting for leave to intervene and some other prayers. That application was supported by an affidavit of one Dr. William Lau Boon Kin ("Dr. William") affirmed on behalf of all the appellants. The respondent claimed that Dr.

A William failed to adduce any proof whatsoever that the appellant interveners had given authority to him (who was not even a purchaser of the Desarina Condominium) to affirm the said affidavit on their behalf. In reply to this allegation, Dr. William tendered an exhibit marked WL3, which were copies of the
B respective authorization letters signed by the appellants. The appellants were successful in their leave application and the respondents appealed against this decision.

Held (dismissing the appeal with costs)
C **Per Suriyadi Halim Omar JCA:**

(1) Dr. William was not a lawyer but a mere management consultant. No affidavits had been filed by any of the appellants to confirm that he had been so authorized to act for them. The panel should not have accepted the so-called
D letter of authorization without any secondary authentication. Without any sworn statement consenting to him acting on their behalf, and not a purchaser either, he was a stranger to the transaction. (para 11)

E **(2)** Where the evidence will be strongly contested, or the credibility of the affidavit is under scrutiny, courts in such circumstances invariably must demand stricter adherence to the rules of evidence. The court may order any contested affidavit struck out if it considers such affidavit as scandalous,
F irrelevant or otherwise oppressive. (para 12)

(3) The flaw in the affidavit went into the heart of the matter, discounting any possible suggestion that they were mere irregularities. (para 14)

G **(4)** The want of personal knowledge apart, Dr. William had said that the facts were obtained from records which he had access to. This blanket statement was unsupported, and had no probative value bearing in mind that he was a management consultant to a company, which had no connection with the
H respondent. He had not even clarified what the records were, where and how he had obtained them. (para 16)

(5) With no admissible evidence on record the court was precluded from going into the merit of the appeal. (para 19)

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Bahasa Malaysia *Translation Of Headnotes*

Responden telah diperintah oleh Mahkamah Tinggi supaya digulungkan. Perayu-perayu adalah pembeli-pembeli di sebuah projek perumahan yang dipanggil Desaria Condominium yang akan dibina oleh responden. Responden gagal menyiapkan pembinaan atau menyerahkan milikan kosong kepada perayu-perayu dalam tempoh yang ditetapkan. Oleh itu, berdasarkan kedudukan mereka sebagai pembeli-pembeli Desaria Condominium tersebut, perayu-perayu telah memfail saman-dalam-kamar memohon kebenaran untuk mencelah serta untuk beberapa relif lain. Permohonan tersebut disokong oleh afidavit seorang Dr. William Lau Boon Kin ('Dr. William') yang berikrar bagi pihak perayu-perayu. Responden mendakwa bahawa Dr. William tidak mengemukakan sebarang bukti yang menunjukkan bahawa perayu-perayu telah memberikan kuasa kepadanya (beliau bukan seorang pembeli Desaria Condominium) untuk mengikrarkan afidavit tersebut bagi pihak mereka. Bagi menjawab alegasi, Dr. William telah mengemukakan satu eksibit yang ditanda sebagai WL3, iaitu salinan surat-surat izin berkenaan yang ditandatangani oleh perayu-perayu. Perayu-perayu berjaya dalam permohonan kebenaran mereka dan responden merayu terhadap keputusan tersebut.

Diputuskan (menolak rayuan dengan kos)
Oleh Suriyadi Halim Omar HMR:

(1) Dr. William bukan seorang peguam tetapi hanyalah seorang perunding pengurusan. Tiada afidavit telah difailkan oleh mana-mana perayu bagi mengesahkan bahawa mereka telah memberi kuasa kepada Dr. William untuk bertindak bagi pihak mereka. Panel semasa tidak harus menerima apa yang dikatakan oleh surat kuasa di sini tanpa apa-apa pengesahan lanjut. Tanpa adanya kenyataan bersumpah yang mengizinkan beliau bertindak bagi pihak mereka, dan kerana beliau bukan seorang pembeli, Dr. William adalah seorang orang luar kepada transaksi.

(2) Di mana keterangan dipertikai dengan hebatnya, atau di mana kredibiliti sesuatu afidavit itu dipersoalkan, mahkamah dalam keadaan sedemikian mestilah menuntut kepatuhan yang lebih ketat terhadap kaedah-kaedah keterangan. Mahkamah mungkin memerintahkan supaya afidavit-afidavit yang dipertikai itu dibatalkan jika ia melihatnya sebagai berskandal, tidak relevan ataupun opresif.

A **(3)** Kecacatan afidavit di sini telah menjejaskan teras halperkara, sekaligus menolak sebarang pengataan bahawa ia hanyalah satu ketidak-teraturan.

(4) Selain ketandusan pengetahuan peribadi, Dr. William juga
B berkata bahawa fakta-fakta adalah diperolehi dari rekod-rekod yang diakseskan oleh beliau. Kenyataan umum ini langsung tidak disokong, dan tidak mempunyai apa-apa nilai probatif, mengambilkira bahawa beliau adalah seorang perunding pengurusan kepada sebuah syarikat yang tiada kena mengena
C dengan responden. Beliau juga tidak menjelaskan apakah sebenarnya rekod-rekod tersebut, dan di mana dan bagaimana beliau memperolehinya.

(5) Dengan tiada keterangan yang boleh diterima-masuk pada
D rekod, maka mahkamah disekat dari mengamati merit-merit rayuan.

Case(s) referred to:
Cantrans Services (1965) Ltd v. Clifford [1974] 1 LNS 14 FC ***(refd)***
Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ
E *248 CA* ***(refd)***
Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***
Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor [1990] 1 CLJ 44; [1990] 1 CLJ (Rep) 200 SC ***(refd)***
MUI Bank v. Alkner Investments (Pte) Ltd [1990] 1 LNS 74 HC ***(refd)***
F *Rossage v. Rossage [1960] WLR 249* ***(refd)***
Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***
UMBC Finance Ltd v. Robin Woon Kim Yan [1991] 1 CLJ 40; [1991] 1 CLJ (Rep) 471 SC ***(refd)***

G **Legislation referred to:**
Rules of the High Court 1980, O. 38 r. 2, O. 41 r. 6

[Appeals from High Court, Kuala Lumpur; Companies Winding-Up Nos: 05-28-526-2000 & D5-28-526-2000]

H *For the appellants - Raslan Loong; M/s Raslan Loong*
For the respondent - KL Wong; M/s KL Wong

Reported by Amutha Suppayah

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JUDGMENT

Suriyadi Halim Omar JCA:

[1] Two appeals were set down for hearing before the panel, namely civil appeals W-02-1257-2005 and W-02-762-2005. Parties had agreed that these appeals be heard together. For easy reference let me state that these appeals had come about as the interveners (hereinafter referred to as the appellants), who were purchasers of the Desarina Condominium, had wanted to intervene in the proceedings between the respondents and another party (hereinafter referred to as the petitioner).

[2] The appellants had filed a summons-in-chambers requesting for leave to intervene and some other prayers *inter alia* a stay order dated 14 August 2003 be set aside or discharged. That application was supported by an affidavit meant to represent all the interveners. The appellants were successful in that leave application but not the other prayers, amongst them, the setting aside of the said order of 14 August 2003. With the appellants and the respondent being equally unhappy they thus had respectively filed the abovementioned civil appeals of W-02-1257-2005 and W-02-762-2005. The appellants were dissatisfied because they had failed to obtain the setting aside order whilst the respondent being dissatisfied with the granting of the leave prayer.

[3] For easy reference I herewith reproduce the summons in chambers filed by the appellants:

SUMMONS IN CHAMBERS

LET ALL PARTIES CONCERNED attend before the Judge in Chambers on the 31 day of March 2005 at … a.m./p.m. for the hearing of an application on the part of the abovenamed Applicants/Proposed Interveners for the following orders:

i) that the abovenamed Applicants be granted leave to intervene in the proceeding herein and be made a party hereto;

ii) that pursuant to the leave granted herein, the abovenamed Applicants be at liberty to apply to this Honourable Court for further directions and/or to vary and/or discharge the Order dated 14.8.2003;

iii) that the Order dated 14.8.2003 be set aside and/or discharged;

A iv) that the abovenamed Applicants be granted leave and to be allowed to be heard on both the Summons In Chambers dated 23.10.2004 and 28.10.2004;

v) that the costs of the application to be provided for; and

B vi) such further and/or other relief …

[4] One Dr. William Lau Boon Kin had affirmed on 21 March 2005 the relevant supportive affidavit of the above summons-in-chambers on behalf of the appellants. Since the legality of his C affidavit underwent some scrutiny by the panel, in the course of the hearing, I find it necessary to reproduce a portion of the impugned affidavit. It reads as follows:

I, DR. WILLIAM LAU BOON KIN (NRIC NO: 451201-08-5657) a Malaysian Citizen of full age and residing at No. 21, D Lingkungan Desa, Taman Desa, 58100 Kuala Lumpur do hereby solemnly affirm and say as follows:

1. I am a Management Consultant in AGS Management Consultants Sdn Bhd and my spouse, Madam Tan Chin Heng is one of the Applicants/Proposed Interveners in this E action and she is also the purchasers of the Desarina Condominium. I am duly authorized by the abovenamed Applicants/Proposed Interveners to affirm this affidavit on their behalf in support of the application filed herein.

F 2. The facts as deposed to in this affidavit are within my knowledge and/or obtained from records to which I have access save as otherwise stated herein.

3. The Applicants/Proposed Interveners are the Purchasers of the Desarina Condominium (hereinafter to be referred to as G "the Purchasers) …

9. I have caused a file search to be conducted at the Registry and it appears that pursuant to an Order dated 14.8.2003, the execution of the Winding-Up Order dated 7.2.2001 had been stayed pending the outcome of the following:

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(a) appeal against the winding-up Order, and/or

(b) disposal of the Civil Suit No. S7-22-667-2000 whichever is later and the parties are at liberty to apply to the Court for further directions …

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14. Wherefore, I humbly pray for an order in terms of the application filed herein.

[5] The respondent had replied to the above affidavit of Dr. William Lau Boon Kin through the affidavit in reply of one Koh Kien Hong, who was the director of the respondent, and indisputably duly authorized to affirm the affidavit on its behalf. He had affirmed that all the facts deposed by him were within his own personal knowledge and/or derived from the respondent. At para. 4, he had affirmed that Dr. William Lau Boon Kin failed to adduce any proof whatsoever that the appellant interveners had given authority to him (who was not even a purchaser of the Desarina Condominium) to affirm the said affidavit on their behalf.

[6] In reply to the allegation of that dubious authority, Dr. William Lau Boon Kin had replied otherwise, in support of which he had tendered an exhibit marked WL3, which were copies of the respective authorization letters signed by them. More of WL3 later.

[7] So, what was the background of this appellants' application? Mega Sakti Sdn Bhd ie, the respondent, was ordered to be wound up by the Kuala Lumpur High Court upon a winding-up petition filed by a creditor ie, Perumahan NCK Sdn Bhd (petitioner) *vide* Winding-Up Petition No. D5-28-526-2000. The appellants, as said above, were the purchasers of the housing project known as the Desarina Condominium to be built by the respondent. The project consisted of 100 units of residential apartments/condominiums and was supposed to be completed sometime in 1997. In the sale and purchase agreement, entered into between the appellants and the respondent, the former had agreed to purchase and the latter to complete and deliver vacant possession of the residential apartments/condominium in accordance with the terms and conditions of the agreement. However, the respondent had failed to complete and deliver vacant within the stipulated time frame. The project was subsequently abandoned in 1999.

[8] On 29 April 2002, the respondent was wound up. Being dissatisfied with the winding up order the respondent had appealed to the Court of Appeal *vide* Civil Appeal No.W-02-136-2001. Pending the outcome of that appeal to the Court of Appeal liquidators were appointed. On 14 August 2003, upon the application made by the respondent, it was ordered, *inter alia*, by the High Court that the execution of the winding up order be

A stayed following the outcome of the Civil Suit No. S7-22-667-2000 filed by the respondent against the petitioner and the disposal of the respondent's appeal to the Court of Appeal.

[9] Being dissatisfied the petitioner had appealed against that
B stay order. On 25 February 2004 the respondent's appeal against the winding-up order was dismissed by the Court of Appeal. No further appeal was taken up after the latter decision. Needless to say, in between, a few applications were filed and dealt with.

C **[10]** On 21 March 2005 the appellants, premised on the ground of them being purchasers of the Desarina Condominium, had filed this application under appeal, which takes us back to WL3. To recount WL3 was supposed to have given authority to Dr. William Lau Boon Kin to act on their behalf. Having perused WL3,
D undeniably they were letters of authorization given to him to sign on the appellants' behalf in relation to the Kuala Lumpur High Court Companies Winding Up No: D5-28-526-2000. He was authorised to do such other acts or things as he deemed necessary or expedient in relation to the legal proceeding and other matters pertaining thereto.
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[11] Despite WL3, the panel apart from realizing that Dr. William Lau was not a lawyer but a mere management consultant, had noted that no affidavits had been filed by any of the appellants to confirm that he had been so authorized to act for them. How
F could the panel have accepted the so-called letter of authorization without any secondary authentication when, especially in this time and age, forgeries appear more authentic than the original? Interestingly enough even the solicitor, who could have done so, did not come forward to clarify the defects of Dr. William Lau's
G affidavit. Whether this failure was a tactical move or not no court can give direction about the type of evidence, or the manner of its application, unless directions have been requested for (*Minister of Labour, Malaysia v. Sanjiv Oberoi & Anor* [1990] 1 CLJ 44; [1990] 1 CLJ (Rep) 200, *Tay Bok Choon v. Tahansan Sdn Bhd*
H [1987] 1 CLJ 441; [1987] CLJ (Rep) 24. Without any sworn statement consenting to him acting on their behalf, and not a purchaser either, we were satisfied that he was a stranger to the transaction.

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[12] The importance of scrutinizing Dr. William Lau's affidavits could not be ignored as this appeal originated from a "hearing by affidavit" (O. 38 r. 2 of the RHC 1980). Such form of hearing is in stark contrast to a trial where evidence is oral and direct. This format is invaluable in circumstances where witnesses are abroad and therefore unavailable for the trial, or where the evidence is uncontested (*UMBC Finance Ltd v. Robin Woon Kim Yan* [1991] 1 CLJ 40; [1991] 1 CLJ (Rep) 471). Where the evidence will be strongly contested, or the credibility of the affidavit is under scrutiny, courts in such circumstances invariably must demand stricter adherence to the rules of evidence (*Malaysian High Court Practice*, 1998 Desk Edition). The court may order any contested affidavit struck out if it considers such affidavit as scandalous, irrelevant or otherwise oppressive (O. 41 r. 6 RHC 1980; *Rossage v. Rossage* [1960] WLR 249; *MUI Bank Bhd v. Alkner Investments (Pte) Ltd* [1990] 3 MLJ 385).

[13] Founded on the above prognosis, with Dr. William Lau Boon Kin being a stranger to the whole affair, without an affidavit by any of the appellants empowering him to act on their behalf, we had no hesitation in rejecting his affidavits. To emphasis on the 'stranger' aspect he could not have any personal knowledge of the sources of any of his assertion or its truth as he never was one of the purchasers. In the Federal Court case of *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997) Edgar Joseph Jr FCJ in same vein had opined that a person who was not a party to the relevant transaction naturally had no personal knowledge of the matter. He had said:

> In the present case, the only material relied on by the Borrower Company in support of the plea of illegality aforesaid was an affidavit by Mr. Augustine who claimed to be a representative of the Court appointed Receiver Tuan Syed \Md. Amin. Mr. Augustine, of course, **was not a party to the transactions and, naturally, had no personal knowledge** of the same (emphasis added).

[14] The flaw in them went into the heart of the matter, discounting any possible suggestion that they were mere irregularities. They being worthless bits of papers, with their contents therefore not worthy of consideration, the application of the appellants were thus without any supporting affidavit. By analogy see the case of *Datuk Bandar Kuala Lumpur v Zain Azahari Zainal Abidin* [1997] 2 CLJ 248 where the Court of Appeal had stated:

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> An affidavit by a **deponent who has no personal knowledge** of the considerations upon which the decision was based is pure hearsay and is **worthless as evidence** and no court can be expected to pay the slightest attention to it.

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[15] To compound the want of personal knowledge, a scrutiny of the affidavit highlighted another glaring flaw ie, the source of the information of Dr. William Lau Boon Kin. In both affidavits he merely affirmed in this manner:

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> The facts as deposed to in this affidavit are within my knowledge and/or obtained from records to which I have access save as otherwise stated herein.

[16] The want of personal knowledge apart, he had said that the facts were obtained from records which he had access to. This

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blanket statement is unsupported, and has no probative value bearing in mind that he is a management consultant to a company, which has no connection with the respondent. He has not even clarified what the records were, where and how he had obtained them. With the exception of the sales of purchase agreement of

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his wife, Madam Tan Chin Heng, no other sales and purchase agreements were attached in the first affidavit. He merely said that he would produce them when required to do so by the court. Subsequently in the affidavit-in-reply, in the form of WL4, the appellants had filed 27 other sales and purchase agreements,

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supporting his assertion that some of the appellants were purchasers of the abandoned apartments. Regardless of this clumsy and circuitous route undertaken by the deponent we were still not convinced as there was still a dearth of affidavit to state that the said Dr. William Lau Boon Kin had been elected to represent them.

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[17] To wind up this issue it is quite elementary that unless a court is satisfied as to the admissible source of the records the information therefore is suspect. To quote Edgar Joseph Jr FCJ in the case of *Lori Malaysia Bhd v. Arab-Malaysian Bhd (supra)*:

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> … it is an elementary proposition sometimes overlooked with resulting confusion and possible injustice that where statements are made by a deponent, based on information and belief these ought not to be looked at all, **unless the court can ascertain not only the source of the information** *and belief* but also unless the deponent's statement is corroborated by someone who speaks from his own (emphasis added).

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[18] In *Cantrans Services (1965) Ltd. v. Clifford* [1974] 1 LNS 14 the issue of non-disclosure of sources of information also took centre stage in relation to an affidavit which had been used by the respondent. This was an appeal from the decision of a judge of the High Court dismissing the appellants' application to set aside the order of the senior assistant registrar granting the respondent leave to issue a writ of summons and to serve notice thereof in Canada, outside the jurisdiction of the court. The contract between the parties expressly declared that the contract was to be deemed to be made in British Columbia, Canada. In the course of the hearing the Federal Court, which thereafter had allowed the appeal, had stated:

> It may be noted here that the record does not set out the notes of evidence of the Senior Assistant Registrar at the hearing of the *ex parte* application, pursuant to which the order of December 14, 1972 was made. The affidavit of the respondent in support thereof did not disclose either his agreement with the appellants or the agreement between the appellants and Majlis Amanah Ra'ayat, both executed on September 19, 1969. The identity of the solicitors or their agents is also not given. 'The report of the agents to the solicitors is not attached. No affidavit by the solicitors or their agents corroborating the respondent's statement in paragraph 7 of his affidavit has been filed herein. ... I am of the opinion that there was non-disclosure of material facts sufficient in the light of the two authorities referred to earlier for this court to set aside the order of the learned judge dismissing the application of the appellants.

[19] With no admissible evidence on record we were thus precluded from going into the merit of the appeal, and thus compelled to conclude that the appeal was without merit and hence had it dismissed with costs.